

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue date: 23May2002**

In the Matter of

PAUL BENTLEY,  
Claimant

v.

RING ENTERPRISES, INC.,  
Employer

and

OLD REPUBLIC INSURANCE,  
Carrier

and

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS  
Party in Interest

Case No.: 2001-BLA-00181

APPEARANCES:

Mr. Ron Carson, Personal Representative  
For the Claimant

Mr. Joseph W. Bowman, Attorney  
For the Employer/Carrier

BEFORE:

Richard T. Stansell-Gamm  
Administrative Law Judge

**DECISION AND ORDER**

This matter involves a claim filed by Mr. Paul Bentley for benefits under the Black Lung Benefits Act, Title 30, United States Code, Sections 901 to 945 ("the Act"). Benefits are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to survivors of persons who died due to pneumoconiosis. Pneumoconiosis is a dust disease of the lung arising from coal mine employment and is commonly known as "black lung" disease.

I conducted a formal hearing in Abingdon, Virginia, on October 3, 2001, attended by Mr. Carson, Mr. Bowman, and Mr. Bentley. My decision in this case is based on the testimony presented

at the hearing and all documents admitted into evidence (DX 1 to DX 37, CX 1 to CX 9, and EX 1 to EX 5).<sup>1</sup>

## **Procedural Background**

### **First Claim**

Mr. Bentley first filed a claim for black lung benefits on June 20, 1984 (DX 34-40). After a pulmonary examination, the U.S. Department of Labor (“DOL”) denied the claim for failure to establish the presence of pneumoconiosis and total disability on May 13, 1985.

### **Second Claim**

When Mr. Bentley filed another claim on May 6, 1986, DOL treated the claim as a modification request (DX 34-40). When Mr. Bentley failed to provide any evidence to establish a change in conditions, DOL denied his claim. His attorney at the time then appealed the denial of benefits in March 1987. In the meantime, in response to DOL’s notice of claim, which it transmitted to every named company in Mr. Bentley’s work history, both Old Republic Insurance Company (“Old Republic”), and Mr. Bowman on its behalf, controverted the claim separately on behalf of Ring Enterprises, Inc. (“Ring”) and Bullion Hollow Coal Company (“Bullion”). Mr. Hubbard also controverted the claim against Hubbard Coal Company (“Hubbard”). Finally, in July 1987, DOL referred Mr. Bentley’s case to the Office of Administrative Law Judges (“OALJ”) for an administrative hearing. During this process Ring Enterprises objected to its designation as the responsible operator because Mr. Bentley had other qualifying coal mine employment after he left Ring. Finally, when Mr. Bentley arrived for his hearing, Administrative Law Judge Nicholas L. Laezza approved his requested withdrawal of his claim.<sup>2</sup>

### **Third Claim**

On August 9, 1994, Mr. Bentley filed his third claim for black lung disability benefits (DX 34-1). During the processing of this claim, a DOL examiner determined the Crockett Coal Company (“Crockett”) was insured by Old Republic (DX 34-6). Old Republic, as the insurer, and its counsel, on Crockett’s behalf, controverted the claim in September 1994 (DX 34- 31 to DX 34-35). On December 1, 1994, DOL denied Mr. Bentley’s claim for failure to prove the presence of pneumoconiosis and total disability (DX 34-24). Mr. Carson on Mr. Bentley’s behalf appealed this

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<sup>1</sup>The following notations appear in this decision to identify exhibits: DX - Director exhibit; CX - Claimant exhibit; EX - Employer exhibit, ALJ - Administrative Law Judge exhibit, and TR - Transcript of the hearing. At the time of its submission CX 5 consisted of only one of two listed pages (TR, page 14). I kept the record open thirty days post-hearing to enable Mr. Carson to submit the second page (TR, page 37). I never received another page so CX 5 consists solely of one page.

<sup>2</sup>As the Benefits Review Board eventually determined, the withdrawal of Mr. Bentley’s first two claims effectively meant they were never filed (DX 34-69 and 20 C.F.R. §725.306 (b)).

adverse decision on December 8, 1994 (DX 34-25). In February 1995, DOL forwarded the case to OALJ for a hearing (DX 34-41). Around the same time, Ring and Old Republic controverted Ring's designation as the responsible operator (DX 34-42). On June 6, 1995, Administrative Law Judge Frederick D. Neusner held a hearing in Abingdon, Virginia and Mr. Bowman entered his appearance as counsel for Old Republic Insurance Company, Ring Enterprises and Crockett Coal Company (DX 34-52). On September 28, 1995, Judge Neusner issued a Decision and Order awarding black lung disability benefits to Mr. Bentley (DX 34-54). Judge Neusner determined: a) Mr. Bentley had 12.5 years of coal mine employment; b) Ring Enterprises was the responsible operator; and, c) Mr. Bentley was totally disabled due to pneumoconiosis. On the issue of pneumoconiosis, Judge Neusner found Dr. Dahhan's assessment inconsistent with the Act and determined that Dr. Paranthaman's somewhat equivocal opinion was sufficient to establish the presence of pneumoconiosis. In October 1995 Ring appealed the award of benefits (DX 34-53). Pending the appeal, DOL initiated interim benefits (DX 34-60).

Upon review, the Benefits Review Board ("BRB" or "Board") in December 1996 affirmed in part, vacated in part, and remand the case to Judge Neusner for further consideration (DX 34-69). On the issue of responsible operator, the BRB vacated the determination that Ring Enterprises was the responsible operator on the basis that Judge Neusner did not determine whether the cumulative period of Mr. Bentley's regular coal mine employment with Bullion Hollow Coal Company and Bullion Hollow Mining rendered Bullion Hollow Coal Company the responsible operator. At the same time, to prevent further delay since Bullion Hollow Coal Company had not been named as a potential responsible operator, the BRB indicated that if Bullion Hollow were found to be the responsible operator, then the Black Lung Disability Trust Fund would become liable for the payment of any benefits payable under the Act. Next, indicating that an equivocal medical opinion was an insufficient basis for a finding of pneumoconiosis, the BRB did not affirm Judge Neusner's finding that Mr. Bentley established the presence of pneumoconiosis through medical opinion. Instead, the Board directed him to reconsider the medical opinions. Further the BRB affirmed Judge Neusner's finding that Mr. Bentley had established total disability under the Act. However, in light of its ruling on the presence of pneumoconiosis, the Board also rejected Judge Neusner's finding that Mr. Bentley was totally disabled due to pneumoconiosis.

On October 22, 1997, on remand and further consideration of the medical opinion, Judge Neusner dismissed Ring Enterprises as the responsible operator and denied Mr. Bentley's claim for black lung disability benefits (DX 34-79). Judge Neusner released Ring Enterprises because DOL had failed to provide sufficient evidence that Ring rather than Bullion Hollow Coal Company was the responsible operator. Then, on the merits of Mr. Bentley's claim, Judge Neusner determined that Mr. Bentley established the presence of pneumoconiosis through the more probable interpretation of the most recent chest x-rays and that he was totally disabled. However, due to Dr. Paranthaman's equivocal opinion, the record lacked sufficient medical opinion on the last element of entitlement. Judge Neusner concluded Mr. Bentley had failed to carry his burden of proving that his total disability was due to pneumoconiosis.

#### Fourth, and Present, Claim

Mr. Bentley filed his fourth claim for black lung benefits on November 22, 1999 (DX 1). Following another pulmonary examination of Mr. Bentley, DOL denied his claim on March 31, 2000 for failure to establish pneumoconiosis or total disability due to pneumoconiosis (DX 14). In the same decision, DOL indicated Mr. Bentley had established six years of coal mine employment. The District Director had also named Ring Enterprises as the responsible operator based on MR. Bentley's Social Security Administration earning record. On May 2, 2000, Mr. Bentley, through Mr. Carson, appealed the denial of his claim and requested a hearing with OALJ (DX 15). After Mr. Bentley furnished additional medical evidence, DOL denied his claim again on August 1, 2000 (DX 26). On September 5, 2000, Mr. Bentley, through Mr. Carson, again requested an OALJ hearing (DX 32). DOL forwarded the claim to OALJ on November 17, 2000 (DX 36). Administrative Law Judge Stuart Levin scheduled a hearing for June 2001 but later granted Mr. Carson's continuance request. As a result, pursuant to a Notice of Hearing, dated June 4, 2001 (ALJ I), I held the formal hearing on October 2001.

### **ISSUES**

1. Length of coal mine employment.
2. Responsible Operator.
3. Whether Mr. Bentley, in filing a duplicate claim in November 1999 has established a material change in condition since the denial of his prior claim on October 22, 1997.
4. If Mr. Bentley establishes a material change in conditions, whether he is entitled to benefits under the Act.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

At the hearing, the parties stipulated that Mrs. Barbara Bentley is a dependent for the purpose of augmenting any benefits that may be payable under the Act. (TR, page 34).

#### **Issue #1 - Length of Coal Mine Employment<sup>3</sup>**

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<sup>3</sup>Since Mr. Bentley filed his duplicate claims, DOL has issued new regulations relating to black lung disability claims. Generally, most of the new provisions of 20 C.F.R. § 718 are applicable to Mr. Bentley's claim, such as the meaning of "total disability due to pneumoconiosis," 20 C.F.R. §718.204. Additionally, many of the  
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Mr. Bentley claims about 18 years of coal mine employment, starting from the early 1960s and ending in 1982 (DX 5 and TR, page 20). However, since Mr. Bentley also described several gaps in coal mining employment during those years (TR, pages 20 to 26), the starting and ending years of his coal mining career do not accurately reflect his actual time employed as a coal miner. Actually establishing the length of coal mine employment has been problematic and generated different results. According to Judge Neusner (without much specific discussion), Mr. Bentley worked a total of 12.5 years as a coal miner (DX 34-54).<sup>4</sup> When DOL adjudicated Mr. Bentley's present claim and reviewed his earning record from the Social Security Administration, it concluded that he had 6.84 years of coal mine employment (DX 36).<sup>5</sup> Based on the introduction of the new regulations and specific guidance on the process for determining the duration of coal mine employment, I reach a third determination that is much closer to DOL's assessment than Judge Neusner's finding.

The new regulations provide a complicated formula for establishing a miner's length of coal mine employment. First, 20 C.F.R. § 725.101 (a) (32) indicates that "year" means a calendar year consisting of either 365 or 366 days, or partial periods totaling one year, during which a miner worked in and around a coal mine for at least 125 working (paid) days. If the miner has worked at least 125 days in a calendar year or "partial periods totaling one year," then he is given credit for one year of coal mine employment, 20 C.F.R. § 725.101 (a) (32) (i). However, if he worked fewer than 125 days in a year, then he receives credit for only a fractional year based on the ratio of number of days actually worked to 125 days, 20 C.F.R. § 725.101 (a) (32) (i). If the evidence is insufficient to establish the beginning and ending dates of a miner's coal mine employment, then the regulations indicate I should divide the miner's yearly income by the coal mine industry's average daily earnings for the year as reported by the Bureau of Labor Statistics ("BLS"), 20 C.F.R. § 725.101 (a) (32) (iii).<sup>6</sup>

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<sup>3</sup>(...continued)

amended provisions of 20 C.F.R. § 725 are applicable, while other sections of Part 725 are applicable only to claims filed after the effective date of the new regulations. *See* 20 C.F.R. § 725.2 (c). For example, the amended, or new, provisions concerning length of coal mine employment do apply to Mr. Bentley's claim, 20 C.F.R. § 725.101 (a) (32). At the same time, several new provisions concerning the determination of responsible operator (20 C.F.R. §§ 725.491 to 495) and duplicate claims (20 C.F.R. § 725.309) are not applicable in this case.

Mr. Bowman's objection to the retroactive application of the newly revised regulations to Mr. Bentley's duplicate claim was noted at my hearing (TR, page 10) and preserved for appellate purposes.

<sup>4</sup>Contrary to Judge Neusner's comment in his Decision and Order on Remand (DX 34-78 ), the BRB did not affirm (or set aside) his length of coal mine employment determination.

<sup>5</sup>Due to the absence of specific information, DOL was unable to substantiate any coal mine employment for Mr. Bentley during its adjudication of the 1984, 1986, and 1994 claims.

<sup>6</sup>As required by the regulations, I have attached a copy of the BLS data on average daily earnings. Additionally, to the extent that the new definition of "year" may conflict with the old provisions on the determination of responsible operator, 20 C.F.R. §§ 725.491 to 752.495, I consider the new definition of year to be  
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Due both to Mr. Bentley's demonstrated inability to always remember specific dates of his coal mine employment,<sup>7</sup> and the absence of evidence covering specific dates of employment, I will use his earnings record from the Social Security Administration in an effort to reconstruct his length of his coal mine employment under the new regulations (DX 34-4).

| <b>Year</b> | <b>Avg. Daily Wage</b> | <b>Company - Yearly Income</b>        | <b>Days Worked (Yearly income/ Avg. Daily Wage)</b> | <b>Fraction (Days worked/125 days) - Yearly credit days</b> |
|-------------|------------------------|---------------------------------------|---|---|
| 1965        | \$25.78                | Christie Coal<br>\$364.52             | 14.1  | 0.1<br>36.5 days  |
| 1966        | \$27.51                | Christie Coal<br>\$154.58             | 5.6   | 0.04<br>14.6 days   |
| (same)      | (same)                 | Fleming Coal<br>\$80.00               | 2.9   | 0.02<br>7.3 days  |
| 1967        | \$29.30                | Bullion Hollow Coal<br>\$56.00        | 1.9   | 0.01<br>3.6 days  |
| 1968        | \$30.41                | Christie Coal<br>\$9.60               | 0.3   | 0.002<br>0.7 day  |
| (same)      | (same)                 | Bullion Hollow Coal<br>\$8.40         | 0.3   | 0.002<br>0.7 day  |
| 1969        | \$34.09                | Bullion Hollow Coal<br>\$80.00        | 2.3   | 0.02<br>7.3 days  |
| (same)      | (same)                 | Kentucky Elkhorn Mining<br>\$1,277.34 | 37.5  | 0.3<br>109.5 days   |
| 1970        | \$38.22                | Kentucky Elkhorn Mining<br>\$2,375.40 | 62.1  | 0.5<br>182.5 days   |
| (same)      | (same)                 | Kentucky Elkhorn Coal<br>\$595.75     | 15.6  | 0.12<br>43.8 days   |
| (same)      | (same)                 | Norton Coal<br>\$52.00                | 1.4   | 0.01<br>3.6 days  |

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<sup>6</sup>(...continued)

controlling on the issue of length of coal mine employment.

<sup>7</sup>For example, Mr. Bentley recalls starting his coal mining work around 1962 (TR, page 21), but the first recorded earnings entry associated with coal mining appears in 1965 with Christie Coal and Coke Company, Norton, VA (DX 34-4).

|        |          |  |       |   |
|--------|----------|--|-------|---|
| (same) | (same)   | Bullion Hollow Coal<br>\$490.14        | 12.8  | 0.1<br>36.5 days                            |
| 1971   | \$40.07  | Bullion Hollow Coal<br>\$2,898.06      | 72.3  | 0.58<br>211.7 days                          |
| 1972   | \$44.61  | Steeles Fork Mining<br>\$58.00         | 1.3   | 0.01<br>3.6 days                            |
| (same) | (same)   | Bullion Hollow Coal<br>\$3,043.35      | 68.2  | 0.55<br>200.8 days                          |
| 1973   | \$47.19  | Bullion Hollow Coal<br>\$594.32        | 12.6  | 0.1<br>36.5 days                            |
| 1974   | \$48.64  | Bullion Hollow Coal<br>\$2,075.28      | 42.7  | 0.34<br>124.1 days                          |
| 1976   | \$64.07  | Humphreys Enterprises<br>\$4,246.12    | 66.3  | 0.53<br>193.5 days                          |
| 1977   | \$71.90  | Humphreys Enterprises<br>\$13,218.5    | 183.8 | One year <sup>8</sup>                       |
| (same) | (same)   | Humphreys Coal Partnership<br>\$546.25 | 7.6   | (Has already<br>received on year<br>credit) |
| 1978   | \$80.31  | Humphreys Enterprises<br>\$60.00       | 0.75  | 0.01<br>3.6 days                            |
| (same) | (same)   | Ring Enterprises<br>\$7,700.00         | 95.9  | 0.77<br>281 days                            |
| 1979   | \$87.03  | Ring Enterprises<br>\$21,951.45        | 252.2 | One year                                    |
| 1980   | \$87.42  | Ring Enterprises<br>\$642.60           | 7.4   | 0.6<br>22 days                              |
| (same) | (same)   | Virginia Coal Processing<br>\$5,505.96 | 63    | 0.5<br>182.5 days                           |
| 1981   | \$96.80  | Crockett Coal<br>\$2,559.26            | 26.4  | 0.21<br>76.7 days                           |
| 1982   | \$101.59 | Crockett Coal<br>\$2,538.09            | 24.9  | 0.2<br>73 days                              |

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<sup>8</sup>According to 20 C.F.R. § 725.101 (a) (32) (i), if evidence establishes that a miner worked in or around a coal mine at least 125 working days during a calendar year, then the miner receives credit for one year, even if the miner worked more than 125 days.

|        |        |                                 |      |                  |
|--------|--------|---------------------------------|------|------------------|
| (same) | (same) | Bullow Hollow Mining<br>\$80.00 | 0.79 | 0.01<br>3.6 days |
|--------|--------|---------------------------------|------|------------------|

Having established the calendar days that cover Mr. Bentley's coal mining employment, the length of such employment is the cumulative total. In this case, based on the cumulative total, I find Mr. Bentley's length of coal mine employment was 7 years and 34.2 days, as follows:

|                          |                    | <u>Cumulative</u>   |
|--------------------------|--------------------|---------------------|
| Christie Coal            | 51.8 days          | 51.8 days           |
| Fleming Coal             | 7.3 days           | 59.1 days           |
| Bullion Hollow Coal      | 1 year, 256.2 days | 1 year, 315.3 days  |
| Kentucky Elkhorn Mining  | 335.8 days         | 2 years, 286.1 days |
| Norton Coal              | 3.6 days           | 2 years, 289.7 days |
| Steeles Fork Mining      | 3.6 days           | 2 years, 293.3 days |
| Humphreys Enterprises    | 1 year, 197.1 days | 4 years, 125.4 days |
| Ring Enterprises         | 1 year, 303.0 days | 6 years, 63.4 days  |
| Virginia Coal Processing | 182.5 days         | 6 years, 245.9 days |
| Crockett Coal            | 149.7 days         | 7 years, 30.6 days  |
| Bullion Hollow Mining    | 3.6 days           | 7 years, 34.2 days  |

## **Issue # 2 - Responsible Operator**

In dismissing Ring Enterprises on remand, Judge Neusner believed DOL had failed to thoroughly investigate the relationship between Bullion Hollow Coal and Bullion Hollow Mining since the record clearly raised the possibility that the two entities, Bullion Hollow Coal and Bullion Hollow Mining, were the same company (since they had the same address) (DX 34-54). In light of that possibility, Judge Neusner believed DOL had not proven that Ring Enterprises was the responsible operator.

Although Ring Enterprises eventually prevailed before Judge Neusner based on the BRB's remand guidance on this issue and was dismissed as the responsible operator (DX 34- 69 and DX 34-79), DOL once again named Ring Enterprises in its adjudication of Mr. Bentley's present, duplicate claim. In the present claim, apparently based in part on the Social Security Administration earnings record (DX 4), DOL still believes Ring Enterprises is the responsible operator. However, Ring Enterprises continues to vehemently contest the issue on the same grounds that the record raises a sufficient issue about the relationship between Bullion Hollow Coal and Bullion Hollow Mining to the extent that DOL has failed to establish that Ring Enterprises is indeed the correct responsible operator (TR, page 9).

One of the fundamental criteria for designation as a responsible operator is that the coal mine operator is the company with which the miner had the most recent period of *cumulative* employment of not less than one year. 20 C.F.R. §725.493 (a)(1) and see *Cole v. East Kentucky Collieries*, 20 B.L.R. 1-51 (1996) and *Director, OWCP v. Trace Fork Coal Co. [Matney]*, 67 F.3d 503 (4<sup>th</sup> Cir.



1995), *rev'g in part sub nom., Matney v. Trace Fork Coal Co.*, 17 B.L.R. 1-145 (1993). At first pass, based on my adjudication of the length of Mr. Bentley's coal mine employment, only three coal mine companies which employed Mr. Bentley appear to satisfy the one year of cumulative employment: Bullion Hollow Coal (1 year, 256.2 days, at various times from 1967 through 1974), Humphreys Enterprises (1 year, 197.1 days, from 1976 to 1978), and Ring Enterprises (1 year, 303 days, from 1978 to 1980). Further, because Ring Enterprises is the most recent of those three coal companies to employ Mr. Bentley as a coal miner, it seems to be the appropriate responsible operator.

However, as Mr. Bowman observed, Mr. Bentley also worked for Bullion Hollow Mining in 1982, after he left Ring Enterprises. As result, if Bullion Hollow Coal and Bullion Hollow Mining are essentially the same company, then Mr. Bentley's short employment in 1982 with Bullion Hollow Mining is added to his time with Bullion Hollow Coal in 1967 to 1974 to effectively make the Bullion Hollow Coal/Bullion Hollow Mining entity a more recent coal mine employer of Mr. Bentley than Ring Enterprises, which then has the effect of removing Ring Enterprises as the responsible operator.

Clearly the two coal mine operator have more than a passing commonality in their names. The Social Security Administration earning record for Mr. Bentley (DX 4) also lists the same business address for the two firms in Wise, Virginia. At the same time, the Internal Revenue Service assigned two distinct employer numbers for the two entities. Consequently, while there is sufficient evidence to raise an issue on whether the two Bullion Hollow companies are related, the record is insufficient to resolve the interrelatedness problem. In such situations according to the courts, since DOL is assigned the burden of developing a record to determine the appropriate responsible operator, the release of another, named putative responsible operator may be appropriate if the evidentiary record is insufficient, *Director, OWCP v. Trace Fork Coal Company*, 67 F.3d 503, 507 (4th Cir. 1995). I find the record in this regard to be insufficient and consequently determined that Ring Enterprises should (once again) be dismissed as a putative responsible operator.

### **Issue # 3 - Material Change in Condition**

Any time within one year of a denial or award of benefits, any party to the proceeding may request a reconsideration based on a change in condition or a mistake of fact made during the determination of the claim; see 20 C.F.R. §725.310. However, after the expiration of one year, the submission of additional material or another claim is considered a duplicate claim which will be denied on the basis of the prior denial unless the claimant demonstrates a material change in conditions under the provisions of 20 C.F.R. §725.309<sup>9</sup> as interpreted by the Benefits Review Board and federal Courts of Appeals. Under this regulatory provision, according to the Court of Appeals for the Sixth Circuit

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<sup>9</sup>Although the new revision of the regulations included changes to 20 C.F.R. § 725.309 relating to material change in conditions (DOL essentially applied the proof of any one element of entitlement as a material change in conditions standard - an approach previously rejected by at least one U.S. Court of Appeals, *see Lovilia Coal Co. v. Harvey*, 109 F. 3d 445, 451 (8th Cir. 1997)), the former version of 20 C.F.R. § 725.309, with the corresponding court interpretations, still applies to Mr. Bentley's claim.

in *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998 (6th Cir. 1994) :

[T]o assess whether a material change is established, the ALJ must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. Then, the ALJ must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits.

The Court of Appeals for the Fourth Circuit, which has jurisdiction over this claim, has followed the *Sharondale* approach. *Lisa Lee Mines v. Director, OWCP*, 57 F.3d 402 (1995), *aff'd* 86 F.3d 1358 (4<sup>th</sup> Cir. 1996)(en banc). I interpret the *Sharondale* approach to mean that the relevant inquiry in a material change case is whether evidence developed since the prior adjudication would now support a finding of an element of entitlement. The court in *Peabody Coal Company v. Spese*, 117 F.3d 1001, 1008 (7<sup>th</sup> Cir. 1997) put the concept in clearer terms:

The key point is that the claimant cannot simply bring in new evidence that addresses his condition at the time of the earlier denial. His theory of recovery on the new claim must be consistent with the assumption that the original denial was correct. To prevail on the new claim, therefore, the miner must show that something capable of making a difference has changed since the record closed on the first application.

In determining whether there has been a material change in condition, I will focus on the four basic elements a claimant must prove by preponderance of the evidence. First, the miner must establish the presence of pneumoconiosis. Second, if a determination has been made that a miner has pneumoconiosis, it must be determined whether the miner's pneumoconiosis arose, at least in part, out of coal mine employment.<sup>10</sup> Third, the miner has to demonstrate he is totally disabled.<sup>11</sup> And fourth, the miner must prove the total disability is due to pneumoconiosis.<sup>12</sup>

With those four entitlement elements in mind, I emphasize again three material principles established by the courts. First, the *Sharondale* court directed that only new evidence developed since the denial of the previous claim may be considered during a material change adjudication. Second, the *Peabody* court maintained that the material change analysis proceeds on the premise that the denial of the prior claim was correct. And, third, the *Sharondale* further directed that if a material change in conditions is established by the new evidence proving an element of entitlement previously

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<sup>10</sup>20 C.F.R. §718.203 (a).

<sup>11</sup>20 C.F.R. §718.204 (b).

<sup>12</sup>20 C.F.R. §718.204 (a).

adjudicated against the claimant, then the entire record is evaluated to determine whether the entire record as a whole supports entitlement to black lung disability benefits.

Applying these principles to Mr. Bentley's case, I first note that when Judge Neusner re-evaluated Mr. Bentley's third claim<sup>13</sup> for benefits on remand, he determined the Claimant had established the first three elements of entitlement. However, Judge Neusner denied Mr. Bentley's claim because the preponderance of the medical opinion did not establish his total disability was due to pneumoconiosis. Since Mr. Bentley was unable to prove in his prior claim that his total respiratory disability was due to pneumoconiosis, he must now present sufficient evidence developed since the denial of his prior claim in October 1997 to support a finding that his total disability is due to pneumoconiosis in order to establish a material change in condition. Additionally, by implication from the *Peabody* court's position that the prior adjudication was correct, I will consider the new evidence given the premise that Mr. Bentley proved in his last prior claim the other three elements, including, specifically, the presence of pneumoconiosis. If Mr. Bentley does establish a material change in conditions, then according to the *Sharondale* court, I must re-adjudicate each element of entitlement, including the presence of pneumoconiosis, based on all the evidence in the record. Notably, in that process, the prior adjudications of Mr. Bentley's earlier three claims are no longer relevant. Specifically, Judge Neusner's findings on the other three elements of entitlement no longer have any effect.

#### Total Disability Due to Pneumoconiosis.

As discussed earlier, the fourth necessary element for entitlement of benefits is total disability due to pneumoconiosis. To establish a connection between a totally disabling pulmonary impairment and pneumoconiosis requires more than proof of the impairment. Absent regulatory presumptions in favor of the claimant,<sup>14</sup> the miner must under 20 C.F.R. § 718.204, as interpreted by the BRB and Federal Courts of Appeal, prove by a preponderance of the evidence that his pneumoconiosis is at least a contributing cause to his total disability. *Hawkins v. Director, OWCP*, 907 F.2d 697,707 (7<sup>th</sup> Cir. 1990). Further, the new version of 20 C.F.R. § 718.204 added provisions that defined the phrase "total disability due to pneumoconiosis." Under the new regulations, 20 C.F.R. § 718.204 (c) (1), total disability is due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of a coal miner's disability. The regulations further specify that pneumoconiosis will be considered a "substantially contributing cause," even if it "materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. § 718.204 (c) (1) (ii).

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<sup>13</sup>Since Judge Laezza approved Mr. Bentley's request to withdraw his first two claims, the third claim he filed for benefits in 1994 is technically his first claim.

<sup>14</sup>20 C.F.R. § 718.304 (if complicated pneumoconiosis is present then there is an irrebuttable presumption miner is totally disabled due to pneumoconiosis); 20 C.F.R. § 718.305 (for claims filed before January 1, 1982, if the miner has fifteen years or more coal mine employment, there is a rebuttable presumption that total disability is due to pneumoconiosis); and, 20 C.F.R. § 718.306 (a presumption when a survivor files a claim prior to June 30, 1982).

Since Mr. Bentley does not have complicated pneumoconiosis and he filed his present claim after 1982, he is not able to rely on any of the regulatory presumptions. Instead, Mr. Bentley must use medical opinion in the record to establish that his total disability is due to pneumoconiosis. Prior to considering the diverse medical opinions in the record a review of the other objective medical tests in the record helps place the physicians' assessments in perspective.

Chest X-rays (July 20 1998 to May 3, 2000)

| <b>Date of X-Ray</b> | <b>Exhibit</b> | <b>Physician</b>               | <b>Interpretation</b>                  |
|----------------------|----------------|--------------------------------|--|
| July 20, 1998        | DX 29          | Dr. Wiot, BCR, B <sup>15</sup> | Emphysema, negative for pneumoconiosis |
| (same)               | DX 29          | Dr. Shirley, BCR, B            | Completely negative                    |
| (same)               | DX 30          | Dr. Spitz, BCR, B              | Completely negative                    |
| (same)               | DX 25          | Dr. Fino, BCR, B               | Completely negative                    |
| April 26, 1999       | DX 29          | Dr. Wiot, BCR, B               | Emphysema, negative for pneumoconiosis |
| (same)               | DX 29          | Dr. Shirley, BCR, B            | Completely negative                    |
| (same)               | DX 30          | Dr. Spitz, BCR, B              | Completely negative                    |
| (same)               | DX 25          | Dr. Fino, B                    | Completely negative                    |
| January 31, 2000     | DX 11          | Dr. Forehand, B                | Completely negative                    |

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<sup>15</sup>B - B Reader; and BCR - Board Certified Radiologist. These designations indicate qualifications a person may possess to interpret x-ray film. A "B Reader" has demonstrated proficiency in assessing and classifying chest x-ray evidence for pneumoconiosis by successful completion of an examination. A "Board Certified Radiologist" has been certified, after four years of study and an examination, as proficient in interpreting x-ray films of all kinds including images of the lungs.

|                  |       |                     |   |
|------------------|-------|---------------------|---|
| (same)           | DX 12 | Dr. Navani, BCR, B  | Positive for pneumoconiosis, profusion 1/1 <sup>16</sup> , type p opacities <sup>17</sup> |
| (same)           | DX 13 | Dr. Barnett, BCR, B | Emphysema; negative for pneumoconiosis  |
| February 2, 2000 | DX 15 | Dr. Navani, BCR, B  | Positive for pneumoconiosis, profusion 1/0, type p/s opacities                            |
| (same)           | DX 29 | Dr. Wiot, BCR, B    | Emphysema; no pneumoconiosis  |
| (same)           | DX 29 | Dr. Shipley, BCR, B | Completely negative   |
| (same)           | DX 30 | Dr. Spitz, BCR, B   | Completely negative   |
| May 3, 2000      | DX 25 | Dr. Fino, B         | Completely negative   |
| (same)           | DX 29 | Dr. Wiot, BCR, B    | Emphysema; no pneumoconiosis  |
| (same)           | DX 29 | Dr. Shipley, BCR, B | Completely negative   |
| (same)           | DX 30 | Dr. Spitz, BCR, B   | No pneumoconiosis   |
| (same)           | EX 1  | Dr. Castle, B       | Negative for pneumoconiosis   |

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<sup>16</sup>The profusion (quantity) of the opacities (opaque spots) throughout the lungs is measured by four categories: 0 = small opacities are absent or so few they do not reach a category 1; 1 = small opacities definitely present but few in number; 2 = small opacities numerous but normal lung markings are still visible; and, 3 = small opacities very numerous and normal lung markings are usually partly or totally obscured. An interpretation of category 1, 2, or 3 means there are opacities in the lung which may be used as evidence of pneumoconiosis. If the interpretation is 0, then the assessment is not evidence of pneumoconiosis. A physician will usually list the interpretation with two digits. The first digit is the final assessment; the second digit represents the category that the doctor also seriously considered. For example, a reading of 1 / 2 means the doctor's final determination is category 1 opacities but he considered placing the interpretation in category 2. Or, a reading of 0/0 means the doctor found no, or few, opacities and didn't see any marks that would cause him or her to seriously consider category 1.

<sup>17</sup>There are two general categories of small opacities defined by their shape: rounded and irregular. Within those categories the opacities are further defined by size. The round opacities are: type p (less than 1.5 millimeter (mm) in diameter), type q (1.5 to 3.0 mm), and type r (3.0 to 10.0 mm). The irregular opacities are: type s (less than 1.5 mm), type t (1.5 to 3.0 mm) and type u (3.0 to 10.0 mm). JOHN CRAFTON & ANDREW DOUGLAS, RESPIRATORY DISEASES 581 (3d ed. 1981).

### Pulmonary Function Tests

| Exhibit        | Date/<br>Doctor              | Age/<br>height | FEV <sub>1</sub><br>pre <sup>18</sup><br>post <sup>19</sup> | FVC<br>pre<br>post | MVV<br>pre<br>post | %FEV <sub>1</sub> /<br>FVC<br>pre<br>post | Qualified <sup>2</sup><br>pre<br>post | Comments                                    |
|----------------|------------------------------|----------------|---|--------------------|--------------------|---|---------------------------------------|---|
| DX 15          | Sep 20, 1999<br>Dr. Craven   | 52<br>68"      | 1.31  | 3.20               |                    | 41  | Yes <sup>21</sup>                     | Severe obstruction,<br>possible restriction |
| DX 6           | Jan 31, 2000<br>Dr. Forehand | 52<br>67"      | 1.59<br>1.60  | 3.54<br>3.43       | 58<br>50           | 45<br>47                                  | Yes <sup>22</sup><br>Yes              | Valid per Dr.<br>Michos (DX 9)              |
| DX 15          | Feb 2, 2000<br>Dr. Smiddy    | 52<br>68"      | 1.71<br>1.92  | 3.38<br>3.70       | 65<br>73           | 50<br>52                                  | Yes<br>Yes                            |   |
| DX 25          | May 3, 2000<br>Dr. Fino      | 52<br>68"      | 1.51<br>1.54  | 3.69<br>3.78       | 58<br>67           | 41<br>41                                  | Yes<br>Yes                            | Moderately severe<br>obstruction            |
| CX 8 &<br>CX 9 | Jan 16, 2001<br>Dr. Craven   | 53<br>68"      | 1.57  | 3.45               |                    | 46  | Yes <sup>23</sup>                     | Moderate<br>obstruction                     |

### Arterial Blood Gas Studies

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<sup>18</sup>Test result before administration of a bronchodilator.

<sup>19</sup>Test result following administration of a bronchodilator.

<sup>20</sup>Under 20 C.F.R. § 718.204 (b) (2) (i), to qualify for total disability based on pulmonary function tests, for a miner's age and height, the FEV<sub>1</sub> must be equal to or less than the value in Appendix B, Table B1 of 20 C.F.R. §718, **and either** the FVC has to be equal or less than the value in Table B3, **or** the MVV has to be equal or less than the value in Table B5, **or** the ratio FEV<sub>1</sub>/FVC has to be equal or less than 55%.

<sup>21</sup>The qualifying FEV<sub>1</sub> number is 2.03 for age 52 and 68". The associated qualifying FVC and MVV values are 2.57 and 81, respectively.

<sup>22</sup>The qualifying FEV<sub>1</sub> number is 1.94 for age 52 and 67". The associated qualifying FVC and MVV values are 2.45 and 78, respectively.

<sup>23</sup>The qualifying FEV<sub>1</sub> number is 2.02 for age 53 and 68". The associated qualifying FVC and MVV values are 2.53 and 81, respectively.

| Exhibit | Date/<br>Doctor              | pCO <sub>2</sub> (rest)<br>pCO <sub>2</sub> (exercise) | pO <sub>2</sub> (rest)<br>pO <sub>2</sub> (exercise) | Qualified <sup>24</sup>                | Comments  |
|---------|------------------------------|--|--|--|---|
| DX 8    | Jan 31, 2000<br>Dr. Forehand | 36<br>38   | 64<br>61   | Yes <sup>25</sup><br>Yes <sup>26</sup> | Valid per Dr. Michos<br>(DX 9)                        |
| DX 15   | Feb 2, 2000<br>Dr. Smiddy    | 36.4   | 73.8   | No                                     | Unable to do exercise<br>portion due to<br>smothering |
| DX 25   | May 3, 2000<br>Dr. Fino      | 37.1   | 62.3   | Yes <sup>27</sup>                      |   |

### Medical Opinions

#### *Dr. J. Randolph Forehand (DX 7)*

Dr. Forehand, board certified in allergy and immunology and pediatrics, examined Mr. Bentley on January 31, 2000. Mr. Bentley had eighteen years of coal mine employment and a cigarette smoking history of nearly thirty years (1966 to 1996) at the rate of a pack to a pack and half a day. He complained about chronic shortness of breath and wheezing. Upon physical examination, Dr. Forehand heard reduced breath sounds and wheezes. Dr. Forehand interpreted a chest x-ray as negative for pneumoconiosis. The pulmonary function tests showed an obstructive impairment. The blood gas test revealed hypoxemia with exercise.

Based on this medical information, Dr. Forehand concluded Mr. Bentley did not have coal workers' pneumoconiosis. Mr. Bentley did have a significant respiratory impairment consisting of insufficient ventilation and oxygen transfer; and, the pulmonary impairment was totally disabling. Dr. Forehand diagnosed the pulmonary condition as chronic bronchitis caused by cigarette use.

#### *Dr. Joseph J. Smiddy*

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<sup>24</sup>To qualify for Federal Black Lung disability benefits at a coal miner's given pCO<sub>2</sub> level, the value of the coal miner's pO<sub>2</sub> must be equal to or less than corresponding pO<sub>2</sub> value listed in the Blood Gas Tables in Appendix C for 20 C.F.R. § 718.

<sup>25</sup>For a pCO<sub>2</sub> value of 36, the qualifying pO<sub>2</sub> value is equal to or less than 64.

<sup>26</sup>For a pCO<sub>2</sub> value of 38, the qualifying pO<sub>2</sub> value is equal to or less than 62.

<sup>27</sup>For a pCO<sub>2</sub> value of 37, the qualifying pO<sub>2</sub> value is equal to or less than 63.

(DX 15, CX 3 to CX7)

In January 2000, Dr. Smiddy, board certified in internal medicine and pulmonary disease, examined Mr. Bentley whose medical history included cardiac disease and oxygen therapy. He also had smoked cigarettes but stopped in 1996. At the time of the examination, Mr. Bentley was unable to walk more than 100 feet without losing his breath. Upon physical examination, Dr. Smiddy heard expiratory wheezes and rales. Dr. Smiddy reported that an old chest x-ray had disclosed the presence of coal workers' pneumoconiosis. Dr. Smiddy deferred a diagnosis until Mr. Smiddy had a pulmonary function test, blood gas study and his x-ray was reviewed by a B reader.

After the requisite tests were accomplished, Dr. Smiddy provided an additional report on February 2, 2000. He observed that the pulmonary tests demonstrated the presence of a severe obstructive ventilatory defect.<sup>28</sup> Further, Mr. Bentley struggled with arterial hypoxemia. Finally, a B reader had diagnosed the presence of coal workers' pneumoconiosis in Mr. Bentley's lungs. Based on this information, Dr. Smiddy diagnosed coal workers' pneumoconiosis, COPD (chronic obstructive pulmonary disease), emphysema, and bronchitis. Due to the pulmonary issues, Mr. Bentley was totally disabled.

In April 2000, Dr. Smiddy heard scattered chest wheezes and rales. He continued to diagnose pneumoconiosis, COPD, emphysema and bronchitis. In an October 2000 follow-up visit, Mr. Bentley's chronic shortness of breath had stabilized while the chest wheezes were scattered. Dr. Smiddy observed that a February 2000 chest x-ray had shown the presence of pneumoconiosis. Dr. Smiddy diagnosed COPD, pneumoconiosis, emphysema and chronic bronchitis.

In a January 2001 follow-up visit, Dr. Smiddy noted serial chest x-rays had shown the presence of pneumoconiosis. His diagnosis remained the same. Finally, On July 5, 2001, Dr. Smiddy indicated Mr. Bentley's bronchitis had been confirmed with a bronchoscope. Mr. Bentley was totally disabled due to significant and severe coal workers' pneumoconiosis, bronchitis and obstructive lung disease. The B reader finding of pneumoconiosis on the chest x-rays was consistent with both Mr. Bentley's impairment and history.

*Dr. Souhail Shamiyeh*  
(DX 15)

In February 2000, Dr. Shamiyeh, Mr. Bentley's treating physician for the previous five years, stated that Mr. Bentley suffered respiratory problems that were affecting his daily activities. The impairment was established by chest x-rays, breathing tests and blood gas studies. Dr. Shamiyeh believed the impairment was caused, at least in part, by Mr. Bentley's exposure to coal dust.

*Dr. Gregory J. Fino*

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<sup>28</sup>This pulmonary function test also referenced 30 pack year cigarette smoking history. A pack year represents the consumption of a pack of cigarettes a day for one year.



(DX 25 and EX 3)

On May 3, 2000, Dr. Fino, board certified in pulmonary and internal medicine, examined Mr. Bentley. Mr. Bentley's coal mine employment covered 18 years and his cigarette smoking history spanned 22 years. At the examination, Mr. Bentley complained about chronic shortness of breath. Upon physical examination, Dr. Fino heard diminished breath sounds and wheezes. The chest x-rays was negative for pneumoconiosis; the pulmonary function test indicated a moderate obstruction unresponsive to bronchodilator; and, the blood gas study revealed mild hypoxia. Additionally, Dr. Fino reviewed Mr. Bentley's medical history since 1984, including the assessments by Dr. Smiddy and Dr Shamiyeh.

After recognizing the concepts of legal and medical pneumoconiosis and then providing a lengthy discussion on diverse medical articles, Dr. Fino concluded there was insufficient objective medical evidence for a diagnosis of coal workers' pneumoconiosis. Instead, Mr. Bentley's totally disabling pulmonary condition is due to his past cigarette smoking habit. Even if Mr. Bentley had coal workers' pneumoconiosis, it did not contribute to his impairment. Dr. Fino observed that Mr. Bentley had an obstructive ventilatory impairment in the absence of radiographic evidence of pneumoconiosis. The pulmonary function test results showed that Mr. Bentley's small airways were obstructed, which is an inconsistent clinical finding for pneumoconiosis. Rather, such an obstruction is associated with cigarettes.

Likewise, since his diffusing capacity seemed normal, clinically significant fibrosis did not appear to be present. Such fibrosis is expected if pneumoconiosis is causing an obstructive abnormality.

In conclusion, Mr. Bentley has a totally disabling pulmonary function. The two risk factors for such a problem are coal dust exposure and cigarette smoke. In Mr. Bentley's case, the "clinical information is consistent with a smoking related disability."

In a September 2001 deposition, Dr. Fino further discussed his findings relating to his examination of Mr. Bentley's pulmonary condition. Both Mr. Bentley's 18 years of coal mining and 30 years of cigarette use put him at risk for developing a pulmonary problem. Dr. Fino characterized his examination findings as abnormal due to Mr. Bentley's decrease breath sounds and wheezing which were consistent with an obstructive pulmonary disease. The pulmonary test was also abnormal but did indicate normal diffusion.

Dr. Fino also reviewed Mr. Bentley's medical record and observed that the pulmonary function tests in 1984 and 1987 were normal. The first abnormal pulmonary test did not appear until 1993 and the tests since then continue to generate abnormal results, with the exception of diffusion capacity. An important consideration in noting the changes in the pulmonary function tests is that Mr. Bentley was no longer working in the coal mines but continued to smoke cigarettes. The more recent blood gas studies show some abnormalities which are also consistent with a cigarette smoker. Additionally, Dr. Fino compared earlier chest x-rays with more recent films and saw no changes consistent with the presence of pneumoconiosis. In other words, there is no worsening of Mr. Bentley's lung condition in the radiographic evidence. This objective medical evidence concerning

Mr. Bentley's totally disabling pulmonary obstruction presents symptoms of a person who has continued to smoke cigarettes. More specifically, based on the normal diffusion test results, Dr. Fino opined that Mr. Bentley's moderately severe obstruction involves emphysema and the narrowing of his breathing tubes. The diffusion results are important because that test indicates whether portion of the lung have been destroyed. Mr. Bentley's normal diffusion test results indicates his lung disease involves his breathing tubes. And, "the most common and frequent and potent cause of breathing tube abnormality is smoking." For these reasons, while acknowledging that pneumoconiosis may be a latent disease and consist of an obstructive impairment, Dr. Fino opined that Mr. Bentley's ventilatory impairment is due to his cigarette smoking and not related to his coal mine employment.

*Dr. James R. Castle*  
(EX 1, EX 2 and EX 4)

In September 2001, Dr. Castle, board certified in internal medicine and pulmonary disease, reviewed Mr. Bentley's medical record, including multiple chest x-ray interpretations, pulmonary function and blood gas tests, and pulmonary evaluations. Based on his evaluation, Dr. Castle opined Mr. Bentley does not have coal workers' pneumoconiosis. Although he had sufficient exposure to coal dust for the presence of the disease, Mr. Bentley also has an extensive tobacco abuse history. To support his opinion, Dr. Castle referenced the preponderance of the negative chest x-rays, the moderately severe obstructive defect with no restriction, and the mixed blood gas test results. Further, the normal diffusion indicates the absence of a pulmonary impairment process usually associated with pneumoconiosis. On the whole, the objective medical evidence is consistent with COPD in the form of chronic bronchitis. Mr. Bentley is totally disabled by the COPD. Dr. Castle also stated that in the absence of physiologic abnormalities associated with coal workers' pneumoconiosis, Mr. Bentley would not be disabled by that lung disease even if it were establish in chest x-ray films.

In a September 2001 deposition, Dr. Castle provided additional analysis on Mr. Bentley's pulmonary impairment. As a starting point, Dr. Castle recalled that he first reviewed Mr. Bentley's medical record in 1995 and actually examined him in 1997. At the time of that examination, Mr. Bentley reported a coal mine employment of 18 years and had a 42 pack year history of cigarette use, which terminated in 1996. He complained about several years of chronic shortness of breath. Dr. Castle interpreted a chest x-ray as negative for pneumoconiosis. Likewise, the majority of the B readers and radiologists did not see coal workers' pneumoconiosis in the chest films. The pulmonary function test indicated a moderate obstructive pulmonary condition, couple with normal diffusion capacity and without a restrictive component. Based on his exam, Dr. Castle diagnosed cigarette smoke induced COPD. Dr. Castle also noted that a pulmonary examination in 1986, about four years after Mr. Bentley stopped coal mining, was normal. In the following ten years, he was no longer exposed to coal dust, but continued to smoke cigarettes. So by the time of the 1997 examination, Mr. Bentley had developed moderate pulmonary obstruction typical for cigarette smokers. In addition to the absence of radiographic evidence of pneumoconiosis, Dr. Castle believed coal dust was not a contributing cause of Mr. Bentley's pulmonary problems because the exercise blood gas

study showed a rise in oxygen intake, rather than the decrease usually associated with pneumoconiosis. In light of all these considerations, Dr. Castle concluded Mr. Bentley's totally disabling pulmonary impairment was not related to his coal mine employment.

Dr. Castle has also considered the medical record that has developed since the 1997 examination and sees no change in Mr. Bentley's condition. The most recent chest x-rays are still read as negative by the majority of the B readers and radiologists. The pulmonary function tests continued to show an obstructive impairment with normal diffusion and no restriction. In fact, the February 2000 test results appear to be a bit better than the tests four years earlier. Mr. Bentley's pulmonary examinations continue to be the type usually associated with tobacco smoke induced airways obstruction.

Dr. Castle expressed his understanding of legal and medical pneumoconiosis, acknowledged pneumoconiosis is a progressive disease and recognized that it might cause an obstructive impairment without a restrictive component. However, when coal workers' pneumoconiosis does start to progress, Dr. Castle would expect to see some objective signs of the progression such as a change in chest x-rays, physiological effects, and alterations of blood gas test results. In Mr. Bentley's case, he has classic tobacco smoked induced airway obstruction based on the pulmonary function and blood gas studies, without any "changes by physical examination, x-ray, or other physiological findings to support the presence of coal workers' pneumoconiosis." In other words, Mr. Bentley's bronchitis and obstructive lung disease are not due to coal workers' pneumoconiosis.

Finally, Dr. Castle expressed his disagreement with Dr. Smiddy's conclusion that the B reader finding of pneumoconiosis as 1/0 established the presence of severe pneumoconiosis. Dr. Castle explained that the 1/0 reading means the interpreter almost thought the x-ray was normal.

### Discussion

In light of the conflicting medical opinions, I must first assess the relative probative value of each medical evaluation and then determine whether Mr. Bentley is able carry his burden of proving through the newly developed medical evidence that his total respiratory disability is due to pneumoconiosis. The two factors I apply in evaluating relative probative weight are: a) documentation and b) reasoning.

As to the first factor, a physician's medical opinion is likely to be more comprehensive and probative if it is based on extensive objective medical documentation, such as chest x-rays, pulmonary function tests, arterial blood gas studies, and physical examinations. *Hoffman v. B & G Construction Company*, 8 B.L.R. 1-65 (1985). In other words, a doctor who considers an array of medical documentation that is both long (involving comprehensive testing) and deep (includes both the most recent medical information and past medical tests) is in a better position to present a more probative assessment than the physician who bases a diagnosis on a test or two or one encounter.

The second factor of reasoning involves an evaluation of the connections a physician makes based on the documentation before him or her. A doctor's reasoning that is both supported by objective medical tests and consistent with all the documentation in the record, is entitled to greater probative weight. *Fields v. Island Creek Coal Company*, 10 B.L.R. 1-19 (1987). Additionally, to be considered well reasoned, the physician's conclusion must be stated without equivocation or vagueness. *Justice v. Island Creek Coal Company*, 11 B.L.R. 1-91 (1988). Additionally, in the material change in condition analysis, I consider a medical opinion that is inconsistent with the findings of the prior claim is not well reasoned for material change purposes.<sup>29</sup>

Applying the two probative determination factors, I consider the opinions of Dr. Forehand, Dr. Fino, and Dr. Castle not well reasoned on the issue of material change because they disagree with Judge Neusner's finding that Mr. Bentley had coal workers' pneumoconiosis. The other two physicians who addressed the causation issue and concluded Mr. Bentley had pneumoconiosis based on chest x-ray evidence, Dr. Smiddy and Dr. Shamiyeh, attributed Mr. Bentley's totally disabling respiratory impairment, in part, to pneumoconiosis. The terseness of Dr. Shamiyeh's opinion adversely affects the probative value of his assessment. However, Dr. Smiddy's opinion is sufficiently documented and reasoned, in regards to the issue of material change to establish that Mr. Bentley has demonstrated that his total disability is due to pneumoconiosis. As a result, Mr. Bentley is able to establish a material change in conditions.

#### **Issue No. 4 - Entitlement to Benefits**

Based on Dr. Smiddy's medical opinion, which was consistent with Judge Neusner's finding that Mr. Bentley had pneumoconiosis, Mr. Bentley has shown a material change in conditions by establishing an element of entitlement previously adjudicated against him in his prior claim. According to 20 C.F.R. §725.309, denial of his duplicate claim based on the denial of his prior claim is no longer appropriate. Instead, I will now conduct a *de novo* evaluation of the entire record to determine whether Mr. Bentley is able to prove all four elements necessary for entitlement of disability benefits under the Act.

#### **Pneumoconiosis**

"Pneumoconiosis" is defined as a chronic dust disease arising out of coal mine employment. The regulatory definitions include both clinical pneumoconiosis, the diseases recognized by the

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<sup>29</sup>As discussed later, upon consideration of the entire record, including the new chest x-rays and interpretations, I reach a different conclusion than Judge Neusner on issue of pneumoconiosis. However, to permit the Employer to relitigate whether Judge Neusner was correct in finding Mr. Bentley had pneumoconiosis at this stage of the adjudication concerning material change seems inconsistent with the material change premise set out by the *Sharondale* and *Peabody* courts. At same time, as will become readily evident, if a Claimant prevails on the material change issue and thus is able to essentially reopen his claim for benefits after a prior denial, then the Employer does have the opportunity to relitigate, absent stipulations of fact, each element of entitlement, including the presence of pneumoconiosis, that the Claimant must prove by a preponderance of the evidence because the courts call for a *de novo* review of the entire record once a material change in conditions is established.

medical community as pneumoconiosis and legal pneumoconiosis, any chronic lung disease arising out of coal mine employment.<sup>30</sup> As courts have noted, under the Act, the legal definition of pneumoconiosis is much broader than medical pneumoconiosis. *Kline v. Director, OWCP*, 877 F.2d 1175 (3d Cir. 1989).

According to 20 C.F.R. §718.202, the existence of pneumoconiosis may be established by four methods: chest x-rays (§718.202 (a)(1)), autopsy or biopsy report (§718.202 (a)(2)), regulatory presumption (§718.202 (a)(3)),<sup>31</sup> and physician medical opinion (§718.202 (a)(4)). Because Mr. Bentley has not presented evidence of complicated pneumoconiosis and he filed his duplicate claim after January 1, 1982, a regulatory presumption of pneumoconiosis is not applicable. In addition, the official record obviously does not contain an autopsy report, and Mr. Bentley has not submitted a biopsy report. As a result, Mr. Bentley will have to rely on chest x-ray evidence or medical opinion to establish the presence of pneumoconiosis. In addition, under the guidance of *Compton*,<sup>32</sup> I must consider both the chest x-ray evidence and medical opinion together to determine whether Mr. Bentley can establish pneumoconiosis.

At this point, I once again stress Judge Neusner determined that Mr. Bentley had pneumoconiosis by focusing solely on the two most recent chest x-rays before him and concluding Dr. Navani's positive for pneumoconiosis interpretation of an April 21, 1997 chest x-ray was more probative than Dr. Castle's negative interpretation of a May 13, 1997 chest film. Now, in my *de novo* review of the entire record on the issue of pneumoconiosis, I have before me a host of new chest x-rays and interpretations that significantly affect the determination of whether the chest x-ray evidence, in the whole record, establishes the presence of pneumoconiosis. For completeness, all the chest x-ray evidence is set out below:

Chest X-Rays ( July 20, 1984 to May 3, 2000)

| Date of X-Ray | Exhibit  | Physician        | Interpretation              |
|---------------|----------|------------------|-----------------------------|
| July 20, 1984 | DX 34-15 | Dr. Eryilmaz     | Negative for pneumoconiosis |
| (same)        | DX 34-14 | Dr. Gaziano, B   | Negative for pneumoconiosis |
| (same)        | DX 34-40 | Dr. Wiot, BCR, B | Completely negative         |

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<sup>30</sup>20 C.F.R. § 719.201 (a) (1) and (2).

<sup>31</sup>If any of the following presumptions are applicable, then under 20 C.F.R. §718.202 (a)(3) a miner is presumed to have suffered from pneumoconiosis: 20 C.F.R. §718.304 (if complicated pneumoconiosis is present then there is an irrebuttable presumption the miner is totally disabled due to pneumoconiosis); 20 C.F.R. §718.305 (for claims filed before January 1, 1982, if the miner has fifteen years or more coal mine employment, there is a rebuttable presumption that total disability is due to pneumoconiosis); and 20 C.F.R. §718.306 (a presumption when a survivor files a claim prior to June 30, 1982).

<sup>32</sup>*See Island Creek Coal Co. v. Compton*, 211 F3d 203, (4<sup>th</sup> Cir. 2000).

|                    |          |                      |   |
|--------------------|----------|----------------------|---|
| (same)             | DX 34-40 | Dr. Spitz, BCR, B    | Completely negative   |
| July 9, 1986       | DX 25    | Dr. Fino, B          | Completely negative   |
| September 9, 1986  | DX 34-17 | Dr. Wheeler, BCR, B  | Completely negative   |
| (same)             | DX 34-16 | Dr. Scott, BCR, B    | Completely negative   |
| December 29, 1986  | DX 34-40 | Dr. Bassham          | Mild fibrosis   |
| (same)             | DX 34-40 | Dr. Robinette, B     | Completely negative   |
| September 14, 1987 | DX 25    | Dr. Fino, B          | Completely negative   |
| October 1, 1987    | DX 34-40 | Dr. Felson, B        | Completely negative   |
| (same)             | DX 34-40 | Dr. Dahhan, B        | Completely negative   |
| (same)             | DX 34-40 | Dr. Wiot, BCR, B     | Completely negative.  |
| June 3, 1992       | DX 25    | Dr. Fino, B          | Completely negative   |
| June 4, 1993       | DX 25    | Dr. Fino, B          | Completely negative   |
| August 24, 1994    | DX 25    | Dr. Fino, B          | Completely negative   |
| (same)             | DX 34-19 | Dr. Wheeler, BCR, B  | Completely negative   |
| (same)             | DX 34-18 | Dr. Scott, BCR, B    | Completely negative   |
| October 5, 1994    | DX 34-20 | Dr. Paranthaman      | Negative for pneumoconiosis, profusion 0/1, type p opacities. <sup>33</sup> |
| (same)             | DX 34-21 | Dr. Frankce, BCR, B  | Negative for pneumoconiosis, profusion 0/1, type q opacities.               |
| (same)             | DX 34-47 | Dr. Fino, B          | Scattered granulomata   |
| (same)             | DX 34-48 | Dr. DeMarino, BCR, B | Completely negative   |
| (same)             | DX 34-48 | Dr. Orr, BCR, B      | Completely negative   |
| February 1, 1995   | DX 34-47 | Dr. Fino, B          | Scattered granulomata   |
| (same)             | DX 34-48 | Dr. Orr, BCR, B      | Completely negative   |
| (same)             | DX 34-48 | Dr. DeMarino, BCR, B | Completely negative   |
| April 21, 1997     | DX 34-74 | Dr. Navani, BCR, B   | Positive for pneumoconiosis, profusion 1/2, type p opacities.               |

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<sup>33</sup>According to 20 C.F.R. § 718.102 (b), a profusion of 0/1 does not constitute a finding of pneumoconiosis.

|                  |          |                     |  |
|------------------|----------|---------------------|--|
| May 13, 1997     | DX 34-73 | Dr. Castle, B       | Completely negative  |
| July 20, 1998    | DX 29    | Dr. Wiot, BCR, B    | Emphysema, negative for pneumoconiosis                         |
| (same)           | DX 29    | Dr. Shirley, BCR, B | Completely negative  |
| (same)           | DX 30    | Dr. Spitz, BCR, B   | Completely negative  |
| (same)           | DX 25    | Dr. Fino, BCR, B    | Completely negative  |
| April 26, 1999   | DX 29    | Dr. Wiot, BCR, B    | Emphysema, negative for pneumoconiosis                         |
| (same)           | DX 29    | Dr. Shirley, BCR, B | Completely negative  |
| (same)           | DX 30    | Dr. Spitz, BCR, B   | Completely negative  |
| (same)           | DX 25    | Dr. Fino, B         | Completely negative  |
| January 31, 2000 | DX 11    | Dr. Forehand, B     | Completely negative  |
| (same)           | DX 12    | Dr. Navani, BCR, B  | Positive for pneumoconiosis, profusion 1/1, type p opacities   |
| (same)           | DX 13    | Dr. Barnett, BCR, B | Emphysema; negative for pneumoconiosis                         |
| February 2, 2000 | DX 15    | Dr. Navani, BCR, B  | Positive for pneumoconiosis, profusion 1/0, type p/s opacities |
| (same)           | DX 29    | Dr. Wiot, BCR, B    | Emphysema; no pneumoconiosis                                   |
| (same)           | DX 29    | Dr. Shipley, BCR, B | Completely negative  |
| (same)           | DX 30    | Dr. Spitz, BCR, B   | Completely negative  |
| May 3, 2000      | DX 25    | Dr. Fino, B         | Completely negative  |
| (same)           | DX 29    | Dr. Wiot, BCR, B    | Emphysema; no pneumoconiosis                                   |
| (same)           | DX 29    | Dr. Shipley, BCR, B | Completely negative  |
| (same)           | DX 30    | Dr. Spitz, BCR, B   | No pneumoconiosis  |
| (same)           | EX 1     | Dr. Castle, B       | Negative for pneumoconiosis                                    |

### Discussion

Of the 18 chest x-rays developed over the course of Mr. Bentley's decades long pursuit of black lung disability benefits, 16 films generated no dispute among the reviewing physicians. The medical experts who evaluated the respective x-rays agree that 15 films (July 20, 1984; July 9, 1986; September 9, 1986; December 29, 1986; September 14, 1987; October 1, 1987; June 3, 1992; June 4, 1992; August 24, 1994; October 5, 1994; February 1, 1995; May 13, 1997; July 20, 1998; April 26, 1999; and May 2, 2000) are negative for pneumoconiosis and one chest x-ray from April 21, 1997 is positive.

The experts did disagree on the interpretation of two recent films. On the January 31, 2000 chest x-ray, Dr. Navani, a well-qualified radiologist, found evidence of black lung disease. However, his expert opinion is outweighed by the negative interpretation of a similarly well qualified radiologist, Dr. Barnett, as supported by the negative finding by another B reader, Dr. Forehand. In a similar manner, Dr. Navani's positive for pneumoconiosis interpretation of the February 2, 2000 x-ray is outweighed by the consensus of three well-qualified radiologists, Dr. Wiot, Dr. Shipley, and Dr. Spitz, who saw no radiographic evidence of black lung disease on the x-ray. Accordingly, I find both the January 31, 2000 and the February 2, 2000 chest x-rays are negative for pneumoconiosis.

In summary, from July 20, 1984 through May 3, 2000, I find the preponderance of the chest x-rays consisting of 17 negative for pneumoconiosis films and including the most recent chest x-rays substantially outweigh the sole positive for pneumoconiosis interpretation of the April 27, 1997 radiographic study. To further place the state of the chest x-ray interpretations into perspective, I note that ten board certified radiologists with B reader credentials evaluated the radiographic evidence in this case. Only one of those radiologists, Dr. Navani, saw the presence of pneumoconiosis in Mr. Bentley's chest x-rays. The other nine similarly well qualified radiologists found the chest x-rays to be negative for pneumoconiosis. I further note that all of the other non-radiologist B readers also did not see pneumoconiosis in the chest films. Consequently, in his present claim, Mr. Bentley is unable to establish the presence of pneumoconiosis in his lungs by the preponderance of the chest x-ray evidence.

#### Medical Opinion

Even though Mr. Bentley in his present claim has failed to demonstrate the presence of pneumoconiosis by the preponderance of the chest x-ray evidence, he may prove this requisite element of entitlement if the preponderance of the probative medical opinion establishes that he has pneumoconiosis.

In addition to the medical examinations previously discussed, Mr. Bentley was the focus of several earlier medical evaluations and assessments as follows:

#### *DOL Examination* (DX 34-40)

In July 1984, an unspecified physician examined Mr. Bentley. After noting 12 years of coal mine employment and a cigarette smoking history of 15 years, the doctor concluded Mr. Bentley had chronic bronchitis but he was not sure if the condition was related to coal dust.

#### *Dr. A. Dahhan* (DX 34-40, DX 34-50, DX 34-53, and DX 34-73)

On October 1, 1987, Dr. Dahhan examined Mr. Bentley and recorded 18 years of coal mine employment. His cigarette smoking started at age 12 and continued to 1996. The chest x-ray was negative and the blood gas became normal with exercise. The pulmonary function test revealed a



moderate airways obstruction. Dr. Dahhan diagnosed chronic bronchitis “accounted for by his smoking history.” Mr. Bentley had no significant pulmonary impairment.

In March 1988, Dr. Dahhan also reviewed Mr. Bentley’s medical record since 1984. He continued to conclude there was insufficient evidence of pneumoconiosis. Mr. Bentley’s chronic bronchitis was related to his smoking habit. Mr. Bentley was not totally disabled.

On February 1, 1995, Dr. Dahhan again examined Mr. Bentley. This time the pulmonary function test showed a severe obstructive defect so that Mr. Bentley was totally disabled. Dr. Dahhan also reviewed the medical records. He concluded the chest x-rays were negative for black lung disease and Mr. Bentley’s impairment did not have a restrictive component. As a result, Mr. Bentley did not have pneumoconiosis. Dr. Dahhan opined the chronic obstructive pulmonary was related to Mr. Bentley’s 30 pack year history.

In June 1997, Dr. Dahhan again reviewed the medical record and stated that Mr. Bentley had cigarette smoke induced emphysema. Dr. Dahhan explained that while pneumoconiosis can cause an obstructive defect, Mr. Bentley does not have complicated pneumoconiosis which causes a secondary obstruction. He also did not have industrial bronchitis because his symptoms continued even though Mr. Bentley left the mines several years earlier.

*Dr. James R. Castle*  
(DX 34-40, DX 34-51 and DX 34-73)

In March 1988, Dr. Castle conducted a medical record review. He concluded Mr. Bentley did not have pneumoconiosis. Chest x-rays were negative for black lung. While Mr. Bentley’s pulmonary function tests showed a mild obstruction, he had sufficient oxygenation of his blood. Consequently, he was not totally disabled.

Several years later, in May 1995, Dr. Castle conducted another medical record review and concluded Mr. Bentley did not have black lung disease. Although Mr. Bentley’s length of coal mine employment provided sufficient exposure for the development of black lung disease, he also had a cigarette smoking history of 30 pack years. The later exposure was sufficient to cause his chronic bronchitis. All his medical tests are consistent with an obstructive airways disease in a person with a long history of cigarette smoking. Thus, Mr. Bentley does not have coal workers pneumoconiosis. Based on Mr. Bentley’s description of his coal mine work, his moderate obstructive lung condition would not preclude him from returning to his last job as a coal miner.

On May 13, 1997, Dr. Castle conducted both a pulmonary examination of Mr. Bentley and reviewed his medical record. Based on this information, Dr. Castle concluded Mr. Bentley did not have pneumoconiosis. Essentially, most of his objective medical evidence was inconsistent with a finding of pneumoconiosis. Mr. Bentley was totally disabled by a chronic obstructive pulmonary disease in the form of tobacco smoke induced chronic bronchitis. Mr. Bentley also struggled with

coronary artery disease and an associated myocardial inaction.

*Dr. S.K. Paranthaman*  
(DX 34-12)

On October 5, 1994, Dr. Paranthaman conducted a pulmonary examination and noted Mr. Bentley's 18 years of coal mine employment and his use of cigarettes for 20 years at the rate of a pack and a half a day. On physical examination, Dr. Paranthaman heard diminished breath sounds. The chest x-ray was negative and the pulmonary function test showed an impairment that was functionally moderately severe, yet Mr. Bentley was borderline on his respiratory ability to mine coal. Dr. Paranthaman diagnosed chronic bronchitis due to cigarette smoke. In addition, the physician stated that if 15 years of coal mine dust exposure were documented, then coal dust might also be an aggravating factor.

#### Discussion

As previously mentioned, in evaluating medical opinion, I first assign relative probative weight based on documentation and reasoning. Also, I once again emphasize that at this stage of the analysis, unlike the earlier material change consideration, I evaluate these opinions within the context of the entire record rather than the prior findings of Judge Neusner.

Turning first to the physicians who support Mr. Bentley's claim for benefit with diagnoses of pneumoconiosis, I find that Dr. Paranthaman's 1994 conclusion that coal dust may be an aggravating factor has diminished probative value for three reasons. First, because Dr. Paranthaman did not consider the medical record and test results developed since 1994, through 2001, his opinion is dated and thus not as well documented as the opinions of other physicians who considered Mr. Bentley's entire medical record. Second, as noted by the BRB in its remand of Judge Neusner initial decision to grant benefits, Dr. Paranthaman's opinion is equivocal. Rather than stating that Mr. Bentley has pneumoconiosis, the physician indicated the presence of pneumoconiosis was possible. Third, and closely related to the equivocal nature of his pneumoconiosis diagnosis, Dr. Paranthaman conditioned his diagnosis on the documentation of 15 years of coal mine employment. Apparently, Dr. Paranthaman believed Mr. Bentley needed to be a coal miner for that amount of time before coal dust became a significant risk factor supporting a diagnosis of pneumoconiosis. However, I have determined that Mr. Bentley was actually engaged in coal mining for less than half that amount of time - seven years. Thus, even if Dr. Paranthaman's diagnosis was unequivocal, Mr. Bentley does not have Dr. Paranthaman's requisite length of coal dust exposure. While Judge Neusner found the disparity between his determination that Mr. Bentley had 12 plus years of coal mining versus Dr. Paranthaman's threshold of 15 years insignificant, I consider the gap between my finding of 7 years of coal mining and 15 years too broad to cross. Consequently, the conditional foundation for Dr. Paranthaman's pneumoconiosis diagnosis does not exist.

Next, as Mr. Bentley's treating physician, Dr. Shamiyeh was in an excellent position to provide a probative assessment of Mr. Bentley's pulmonary condition. The new regulation, 20

C.F.R. § 718.104 (d), even recognizes the special status of a treating physician and indicates his opinion is entitled to more probative weight. I have consider Dr. Shamiyeh's status as a treating physician and recognize that he has treated Mr. Bentley for five years. However, I still give his terse opinion that Mr. Bentley has pneumoconiosis reduced probative weight for both documentation and reasoning deficits.

In his letter stating Mr. Bentley has pneumoconiosis, Dr. Shamiyeh, other than referencing being his treating physician for five years, did not indicate the frequency of his visits with Mr. Bentley or the extent of his treatments. As a result, I am unable to determine whether Dr. Shamiyeh's enhanced evidentiary status as a treating physician is warranted. Similarly, also due to the terse nature of his statement, I am unable to ascertain with specificity the exact documentation that Dr. Shamiyeh relied upon to reach his diagnosis. For example, he references chest x-rays as a basis for his conclusion that Mr. Bentley's impairment is related to his exposure to coal dust. Yet, absent information on which x-rays he considered, I am unable to determine whether his opinion is well reasoned, particularly since I have determined that the overwhelming preponderance of the chest x-ray evidence is negative for pneumoconiosis. Finally, Dr. Shamiyeh's statement is not well reasoned because he simply gives his conclusion and references the general x-rays and pulmonary tests without explaining how these test results support his diagnosis.

Dr. Smiddy is the third physician supporting Mr. Bentley's claim that he has pneumoconiosis. Based on his examinations in January 2000, April 2000, and January 2001, plus his apparent treatment of Mr. Bentley for pulmonary issues during this time, Dr. Smiddy may also be considered a treating physician. However, his assessment still suffers probatively due to his reliance on serial chest x-rays that show the presence of pneumoconiosis. These x-rays apparently are Dr. Navani's positive interpretations. But, as I have determined, Dr. Navani stands alone in his opinion that the chest x-rays show the presence of pneumoconiosis. Dr. Smiddy's opinion becomes deficient in terms of documentation because he relies on one radiologist's positive for pneumoconiosis opinion without either considering or addressing that several other similarly qualified radiology experts found no pneumoconiosis in the same serial chest x-rays. Dr. Smiddy's diagnosis of "severe" coal workers pneumoconiosis in reference to positive chest x-rays is also not well reasoned since the actual preponderance of the chest x-ray evidence is negative for pneumoconiosis. As a result, the apparent principal foundation for Dr. Smiddy's pneumoconiosis diagnosis is inaccurate and thus adversely affects the probative value of his opinion.

Turning to the doctors who believed Mr. Bentley did not have pneumoconiosis, I find Dr. Forehand's opinion, while reasoned, has diminished, relative probative value. Because he based his conclusions on one pulmonary examination, his pulmonary assessment is not as well documented as other medical assessments.

Dr. Dahhan's evaluation of Mr. Bentley's pulmonary condition based on an extensive medical record review and two examinations is well documented, though somewhat dated. However, his opinion has diminished probative valued based on his focus on the absence of a restrictive component to Mr. Bentley's pulmonary condition. Both Judge Neusner and the BRB found Dr. Dahhan's approach too narrow to entitle his opinion to much probative weight. I agree.

I consider the remaining two medical opinions of Dr. Fino and Dr. Castle to be both well documented and reasoned. Although neither reviewing doctor was a treating physician, they considered Dr. Smiddy's and Dr. Shamiyeh's evaluation results and opinions. Also, both physicians coupled their extensive record review with at least one pulmonary examination of Mr. Bentley. Further, since the preponderance of the chest x-ray evidence is negative for pneumoconiosis, their comprehensive review of Mr. Bentley's medical documentation on the issue of whether other medical evidence establishes the presence of pneumoconiosis has important probative value. Unlike Dr. Dahhan's narrow approach, both physicians took a broader approach by considering the possibility of both medical and legal pneumoconiosis. Further, their opinions are very well reasoned. Each physician integrates all the objective medical test results in the record and explains how he concludes Mr. Bentley does not have pneumoconiosis but instead is struggling with the disabling pulmonary consequences of his long term cigarette smoking habit. In particular, Dr. Fino points to the normal diffusion pulmonary test results as support for this conclusion that Mr. Bentley has a typical case of tobacco smoke induced obstruction which involves the narrowing of his breathing tubes rather than the respiratory consequences typically associated with coal dust induced pulmonary damage.

Having considered the respective probative value of the multiple, and conflicting, medical opinions in this case, I find for the reasons noted above that the medical opinions of Dr. Fino and Dr. Castle that Mr. Bentley does not have pneumoconiosis are the more probative assessments and the opinions most consistent with the objective medical evidence in this case. Their well documented and reasoned consensus that Mr. Bentley does not have black lung disease clearly outweighs the contrary opinions of Dr. Smiddy and Dr. Shamiyeh. As result, Mr. Bentley is unable to establish the presence of pneumoconiosis through the more probative medical opinion.

## **CONCLUSIONS**

Mr. Bentley worked as a coal miner for 7 years and 34.2 days.

The evidentiary record is insufficient to determine the appropriate responsible operator. As a result, Ring Enterprises must be dismissed as the responsible operator.

Although Mr. Bentley did establish a material change in condition, he is unable to prove based on the entire record that he has pneumoconiosis. The radiographic evidence is negative for pneumoconiosis. Likewise, the preponderance of the more probative medical opinion does not establish the presence of pneumoconiosis in Mr. Bentley's lungs. Further, and obviously, when both the preponderance of the chest x-ray evidence and more probative medical opinions are considered together, the record fails to establish the presence of pneumoconiosis. Having the burden of proving that he has pneumoconiosis, Mr. Bentley is unable to prove that critical element of entitlement by a preponderance of the evidence. Accordingly, having failed to establish one of the requisite elements for the entitlement of benefits under the Act, Mr. Bentley's claim for black lung disability benefits must be denied.

## **ORDER**

1. RING ENTERPRISES, INC. is **DISMISSED** as a putative responsible operator.
2. The claim of MR. PAUL BENTLEY for benefits under the Act is **DENIED**.

**SO ORDERED:**

**A**  
RICHARD T. STANSELL-GAMM  
Administrative Law Judge

Date Signed: May 22, 2002  
Washington, DC

**NOTICE OF APPEAL RIGHTS:** Pursuant to 20 C.F.R. §725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date this decision is filed with the District Director, Office of Worker's Compensation Programs, by filing a notice of appeal with the Benefits Review Board, ATTN.: Clerk of the Board, Post Office Box 37601, Washington, DC 20013-7601. See 20 C.F.R. §725.478 and §725.479. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, DC 20210.

## Attachment 1

## COAL MINE (BLBA) PROCEDURE MANUAL

## Resource Book

## Exhibits

AVERAGE EARNINGS OF EMPLOYEES IN COAL MINING

| <u>Year</u> | <u>Yearly (125 days)</u> | <u>Daily</u> |
|-------------|--------------------------|--------------|
| 1999        | \$19,340.00              | \$154.72     |
| 1998        | 19,160.00                | 153.28       |
| 1997        | 19,010.00                | 152.08       |
| 1996        | 18,740.00                | 149.92       |
| 1995        | 18,440.00                | 147.52       |
| 1994        | 17,760.00                | 142.08       |
| 1993        | 17,260.00                | 138.08       |
| 1992        | 17,200.00                | 137.60       |
| 1991        | 17,080.00                | 136.64       |
| 1990        | 16,710.00                | 133.68       |
| 1989        | 16,250.00                | 130.00       |
| 1988        | 15,940.00                | 127.52       |
| 1987        | 15,750.00                | 126.00       |
| 1986        | 15,390.00                | 123.12       |
| 1985        | 15,250.00                | 122.00       |
| 1984        | 14,800.00                | 118.40       |
| 1983        | 13,720.00                | 109.76       |
| 1982        | 12,698.75                | 101.59       |
| 1981        | 12,100.00                | 96.80        |
| 1980        | 10,927.50                | 87.42        |
| 1979        | 10,878.75                | 87.03        |
| 1978        | 10,038.75                | 80.31        |
| 1977        | 8,987.50                 | 71.90        |
| 1976        | 8,008.75                 | 64.07        |
| 1975        | 7,405.00                 | 59.24        |
| 1974        | 6,080.00                 | 48.64        |
| 1973        | 5,898.75                 | 47.19        |
| 1972        | 5,576.25                 | 44.61        |
| 1971        | 5,008.75                 | 40.07        |
| 1970        | 4,777.50                 | 38.22        |
| 1969        | 4,261.25                 | 34.09        |
| 1968        | 3,801.25                 | 30.41        |
| 1967        | 3,662.50                 | 29.30        |
| 1966        | 3,438.75                 | 27.51        |
| 1965        | 3,222.50                 | 25.78        |
| 1964        | 3,031.25                 | 24.25        |
| 1963        | 2,835.00                 | 22.68        |
| 1962        | 2,717.50                 | 21.74        |
| 1961        | 2,645.00                 | 21.16        |

BituminousAnthracite

| <u>Year</u> | <u>Yearly</u> | <u>Daily</u> | <u>Yearly</u> | <u>Daily</u> |
|-------------|---------------|--------------|---------------|--------------|
| 1960        | \$2,687.50    | \$21.50      | \$2,266.25    | \$18.13      |
| 1959        | 2,661.25      | 21.29        | 2,183.75      | 17.47        |
| 1958        | 2,415.00      | 19.32        | 2,130.00      | 17.04        |
| 1957        | 2,581.25      | 20.65        | 2,172.50      | 17.38        |
| 1956        | 2,472.50      | 19.78        | 2,083.75      | 16.67        |
| 1955        | 2,275.00      | 18.20        | 1,935.00      | 15.48        |
| 1954        | 2,022.50      | 16.18        | 1,775.00      | 14.20        |
| 1953        | 2,097.50      | 16.78        | 1,695.00      | 13.56        |
| 1952        | 1,880.00      | 15.04        | 1,750.00      | 14.00        |
| 1951        | 1,915.00      | 15.32        | 1,692.50      | 13.54        |
| 1950        | 1,633.75      | 13.07        | 1,553.75      | 12.43        |
| 1949        | 1,465.00      | 11.72        | 1,447.50      | 11.58        |
| 1948        | 1,691.25      | 13.53        | 1,342.50      | 10.74        |
| 1947        | 1,606.25      | 12.85        | 1,262.50      | 10.10        |
| 1946        | 1,362.50      | 10.90        | 1,060.00      | 8.48         |
| 1945        | 1,315.00      | 10.52        | 876.25        | 7.01         |
| 1944        | 1,267.50      | 10.14        | 733.75        | 5.87         |
| 1943        | 1,057.50      | 8.46         | 648.75        | 5.19         |
| 1942        | 857.50        | 6.86         | 705.00        | 5.64         |
| 1941        | 750.00        | 6.00         | 657.50        | 5.26         |
| 1940        | 617.50        | 4.94         | 648.75        | 5.19         |
| 1939        | 598.75        | 4.79         | 705.00        | 5.64         |
| 1938        | 525.00        | 4.20         | 657.50        | 5.26         |
| 1937        | 585.00        | 4.68         | 693.75        | 5.55         |
| 1936        | 552.50        | 4.42         | 703.75        | 5.63         |
| 1935        | 478.75        | 3.83         | 707.50        | 5.66         |
| 1934        | 450.00        | 3.60         | 750.00        | 6.00         |
| 1933        | 375.00        | 3.00         | 717.50        | 5.74         |
| 1932        | 362.50        | 2.90         | 726.25        | 5.81         |
| 1931        | 455.00        | 3.64         | 801.25        | 6.41         |
| 1930        | 560.00        | 4.48         | 875.00        | 7.00         |
| 1929        | 647.50        | 5.18         | 863.75        | 6.91         |
| 1928        | 671.25        | 5.37         | 912.50        | 7.30         |
| 1927        | 723.75        | 5.79         | 925.00        | 7.40         |
| 1926        | 717.50        | 5.74         | 1,062.50      | 8.50         |
| 1925        | 713.75        | 5.71         | 1,065.00      | 8.52         |
| 1924        | 811.25        | 6.49         | 1,058.75      | 8.47         |
| 1923        | 925.00        | 7.40         | 1,007.50      | 8.06         |
| 1922        | 582.50        | 4.66         | 907.50        | 7.26         |
| 1921        | 905.00        | 7.24         | 933.75        | 7.47         |
| 1920        | 817.50        | 6.54         | 888.75        | 7.11         |